

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**WILLIAM LUCAS,
Grievant,**

v.

Docket No. 2013-1982-MnrED

**MONROE COUNTY BOARD OF EDUCATION,
Respondent.**

DECISION

Grievant, William Lucas, is employed by Respondent, Monroe County Board of Education. On May 31, 2013, Grievant filed this grievance against Respondent stating, "Respondent failed to renew Grievant's probationary contract of employment citing absenteeism. Grievant contends that the nonrenewal of his contract was not justified, was arbitrary and capricious (disparate treatment). Grievant asserts violations of W. Va. Code 18A-2-12a, 18A-2-8a¹, & 6C-2-2." For relief, grievant seeks "renewal of his contract for the 2013-2014 school year and future years with compensation or restitution for al[l] lost wages and benefits, pecuniary and nonpecuniary, with interest. [G]rievant also seeks removal [of] all references to the nonrenewal of his contract from any and al[l] [sic] files maintained by Respondent or its agents."

Grievant appealed to level one of the grievance process on May 31, 2013. The parties jointly requested the matter be waived to level three, which was granted. A level three hearing was held on September 16, 2013, before the undersigned in Beckley, West Virginia. Grievant was represented by John Everett Roush, West Virginia School Service Personel Association. Respondent was represented by counsel, Jason S. Long, Dinsmore & Shohl LLP. This matter became mature for decision on October 15,

¹ Grievant also asserted violation of West Virginia Code § 18A-2-8 at the level three hearing and in his Proposed Findings of Fact and Conclusions of Law.

2013, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant, a probationary employee, grieved the nonrenewal of his probationary contract. West Virginia Code § 18A-2-8a, not West Virginia Code § 18A-2-8, applies to the nonrenewal of a probationary contract at the end of the school year. Respondent properly followed the requirements of West Virginia Code § 18A-2-8a in the nonrenewal of Grievant's contract. Grievant failed to prove that Respondent's decision was arbitrary and capricious given Grievant's history of absenteeism and continued absence even after taking all days off allowed under his contract. Accordingly, the grievance is denied.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant was a probationary Custodian for Respondent. He first signed a probationary contract as a Custodian for Peterstown Elementary School for the 2010-11 school year. In September 2010, Grievant accepted a position as a Custodian at Peterstown Middle School and signed a second probationary contract.
2. By letter dated December 22, 2010, Grievant was notified that his contract would be terminated at the end of the school year due to the elimination of his position. Grievant was reduced in force at the end of the 2010-11 school year.
3. In December 2011, a Custodian vacancy occurred at Peterstown Elementary School, for which Grievant applied and was selected.

4. Grievant signed a probationary contract in January 2012, for the remainder of the school year as a Custodian for Peterstown Elementary School.

5. Grievant was evaluated on May 21, 2012. Grievant's evaluation rated him as not meeting standards relating to attendance. Grievant was instructed that future absences would require a doctor's excuse. Grievant was rated as meeting standards in all other areas. Grievant was rated "Does Not Meet Standards" overall, pursuant to the instructions on the Service Personnel Evaluation, which states that one or more rating of does not meet standards requires an overall rating of does not meet standards.

6. As Grievant was hired in January 2012, at the time of his evaluation, he had only been working at Peterstown Elementary School for five months. In that time, he had been absent 21 ½ days.

7. On June 1, 2012, Grievant received a second evaluation, with the same ratings as before, except the overall rating, which was "Meets Standards (with conditions regarding absences)". The evaluation states, "For future absences, please submit a Dr.'s excuse and/or ask for permission to use non-paid days in advance of absence."

8. Grievant received a third probationary contract as a Custodian for Peterstown Elementary School for the 2012 -13 school year.

9. Grievant's attendance problems continued throughout the 2012-13 school year. Principal Leigh Boggess continued to address her concerns with Grievant about his absenteeism, failure to notify of absences in advance, and calling off after the start of the workday. Grievant's failure to notify Principal Boggess properly of absences sometimes resulted in the inability to secure a substitute for Grievant.

10. By letter dated February 27, 2013, Superintendent Joetta Basile notified Grievant that he had overused his sick leave, OSE² and non-paid days off, which was a violation of Grievant's contract. The letter also notified Grievant that a meeting would be held on March 8, 2013.

11. At the time of the meeting, Grievant had been absent 44.5 days. Grievant had provided doctor's excuses covering 42 days. There were also days where Grievant had called in after his start time or left early, which delayed or prevented obtaining a substitute for Grievant. By February 7, 2013, Grievant had taken all the days allowed under his contract.³ Although he had no further time allowed under his contract, he continued to be absent, missing another 10 days before the meeting.

12. On March 8, 2013, Superintendent Basile and Principal Boggess met with Grievant to discuss his absences and the fact that Grievant had exceeded the number of days he was allowed to take off under his contract, and that he would not be allowed to take any further leave without Board approval. This meeting was memorialized by letter dated March 11, 2013.

13. On March 19, 2013, Superintendent Basile provided the Board with a list of probationary employees to be rehired for the 2013-14 school year, and Grievant was not included.

14. By letter dated March 22, 2013, Superintendent Basile notified Grievant

²Out of School Environment.

³Although Grievant asserts that he did not run out of allowable days until February 29, 2013, February 29, 2013 is simply the date that the payroll clerk made the adjustments to Grievant's contract. The actual content of the note states that the clerk had to make adjustment to Grievant's contract by 2.85 days beginning part of the day on February 7, 2013, because Grievant had run out of sick leave.

that he had not been recommended for rehire, and informed him of his right to hearing.

15. Grievant requested a hearing on March 29, 2013. Superintendent Basile scheduled the hearing for April 16, 2013, notifying Grievant by letter dated April 9, 2013.

16. Grievant was again evaluated on March 15, 2013, and placed on a written improvement plan, but that evaluation was not considered by the Superintendent in her decision not to recommend Grievant for rehire.

17. Grievant requested the April 16, 2013 hearing be continued, and Respondent rescheduled the hearing for May 7, 2013.

18. Grievant was provided a hearing before the Board on May 7, 2013.

19. By letter dated May 9, 2013, Superintendent Basile notified the Grievant that the Board had voted not to renew his probationary contract due to his absenteeism.

Discussion

Contrary to Grievant's argument, the nonrenewal of a contract is not a termination or a disciplinary matter, and, therefore, Grievant has the burden of proving his grievance by a preponderance of the evidence. *Jenkins v. Jefferson County Bd. of Educ.*, Docket No. 2008-1760-CONS (March 4, 2009) (citing *McClain v. Jackson County Bd. of Educ.*, Docket No. 04-18-182 (Feb. 28, 2005); *Loundman-Clay v. Higher Educ. Policy Comm'n*, Docket No. 02-HEPC-013 (Aug. 29, 2002); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988)). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant argues the nonrenewal of his contract was disciplinary in nature and governed by West Virginia Code § 18A-2-8, which entitled him to evaluation and an opportunity to improve. Grievant further argues the number of days Grievant missed was not excessive enough to justify the nonrenewal of his contract, and Grievant was just unlucky enough to have many bad things happen to him all in the same year. Respondent asserts the nonrenewal of Grievant's contract is clearly governed by West Virginia Code § 18A-2-8a, not West Virginia Code § 18A-2-8, and Respondent properly followed West Virginia Code § 18A-2-8a. Respondent further asserts Grievant's absenteeism was a sufficient basis for the nonrenewal of his contract

"[T]he Legislature intended for probationary employees to be treated differently than non-probationary employees." *Baker v. Bd. of Educ., County of Hancock*, 534 S.E.2d 378, 382 (W.Va., 2000) (*per curiam*). The nonrenewal of a probationary contract at the end of the school year, even for cause and if disciplinary in nature, is governed by West Virginia Code § 18A-2-8a, not West Virginia Code § 18A-2-8. *Id.* West Virginia Code § 18A-2-8a states:

The superintendent at a meeting of the board on or before April 15 of each year shall provide in writing to the board a list of all probationary teachers that he or she recommends to be rehired for the next ensuing school year. The board shall act upon the superintendent's recommendations at that meeting in accordance with section one of this article. The board at this same meeting shall also act upon the retention of other probationary employees as provided in sections two and five of this article. Any such probationary teacher or other probationary employee who is not rehired by the board at that meeting shall be notified in writing, by certified mail, return receipt requested, to such persons' last known addresses within ten days following said board meeting, of their not having been rehired or not having been recommended for rehiring.

Any probationary teacher who receives notice that he or she has not been recommended for rehiring or other probationary employee who has not been reemployed may within ten days after receiving the written notice request a statement of the reasons for not having been rehired and may request a hearing before the board. The hearing shall be held at the next regularly scheduled board of education meeting or a special meeting of the board called within thirty days of the request for hearing. At the hearing, the reasons for the nonrehiring must be shown.

“West Virginia Code § 18A-2-8a gives broad discretion to the county board when determining whether or not to rehire a probationary employee, and to prove his case, Grievant must establish the board’s decision to not renew his contract was arbitrary and capricious.” *Mellow v. Jefferson County Bd. of Educ.*, Docket No. 2010-1397-JefED (Oct. 8, 2010) (citing *Beheler v. Logan County Bd. of Educ.*, Docket No. 98-23-276 (Dec. 11, 1998); See *Miller v. Bd. of Educ.*, 190 W. Va. 153, 437 S.E.2d 591 (1993); *Pockl v. Ohio County Bd. of Educ.*, 185 W. Va. 256, 406 S.E.2d 687 (1991); *Rogers v. Logan County Bd. of Educ.*, Docket Nos. 99-23-196/246 (Nov. 16, 2002)). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604 at 614, 474 S.E.2d 534 at 544 (1996). (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). “A board of education may not ‘refuse to rehire a probationary employee for just any, or no, reason.’ *Cordray v. Wood County Bd. of Educ.*, Docket No. 90-54-267 (Jan. 31, 1991). The reasons identified by Respondent for not rehiring Grievant must support that decision. However, those reasons need not rise to the level of a ‘for cause’ requirement. *Stewart v. Berkeley County Bd. of Educ.*, Docket No. 99-02-224 (Mar. 31, 2000).” *Jarrell v. Jackson County Bd. of Educ.*, Docket No. 04-18-204 (Oct. 27, 2004).

Respondent's nonrenewal of Grievant's contract clearly complied with the requirements of West Virginia Code § 18A-2-8a, which is the governing code section in this case. There being no procedural deficiency, Grievant must prove by a preponderance of the evidence that Respondent's decision was arbitrary and capricious in light of Grievant's probationary status. Grievant's absences were clearly excessive. Regardless of doctor's excuses, Grievant had taken all the time available to him under his contract by February 7, 2013, and continued to miss work thereafter. Further, Grievant's failure to properly call in at times had caused delay or inability to obtain a substitute for Grievant, who was the only custodian at the school during the day. Grievant's absenteeism was particularly troublesome given his excessive absences for the half year he had worked for Respondent at Peterstown Elementary School the prior school year, which established a pattern of problematic attendance. Grievant's evaluation for the previous school year found he did not meet standards due to his attendance, and Principal Boggess had continued to discuss Grievant's attendance with him throughout the 2012–13 school year. Grievant was aware of the expectations regarding his attendance and continued to be excessively absent. While it is true that Grievant suffered various illnesses and accidents that contributed to the number of his absences, it is not unreasonable for Respondent to decide Grievant's absenteeism spanning two school years made him unreliable and not a candidate for rehire given his probationary status. Respondent's stated reasons for nonrenewal do not have to rise to the level of a "for cause" dismissal of a regular employee, and Grievant did not prove that Respondent's decision was arbitrary and capricious.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The nonrenewal of a contract is not a termination or a disciplinary matter, and, therefore, Grievant has the burden of proving his grievance by a preponderance of the evidence. *Jenkins v. Jefferson County Bd. of Educ.*, Docket No. 2008-1760-CONS (March 4, 2009) (citing *McClain v. Jackson County Bd. of Educ.*, Docket No. 04-18-182 (Feb. 28, 2005); *Loundman-Clay v. Higher Educ. Policy Comm'n*, Docket No. 02-HEPC-013 (Aug. 29, 2002); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988)). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. "[T]he Legislature intended for probationary employees to be treated differently than non-probationary employees." *Baker v. Bd. of Educ., County of Hancock*, 534 S.E.2d 378, 382 (W.Va., 2000) (*per curiam*). The nonrenewal of a probationary contract at the end of the school year, even for cause and if disciplinary in nature, is governed by West Virginia Code § 18A-2-8a, not West Virginia Code § 18A-2-8. *Id.*

3. The nonrenewal of Grievant's contract is governed by West Virginia Code § 18A-2-8a states:

The superintendent at a meeting of the board on or before April 15 of each year shall provide in writing to the board a list of all probationary teachers that he or she recommends to be rehired for the next ensuing school year. The board shall act upon the superintendent's recommendations at that meeting in accordance with section one of this article. The board at this same meeting shall also act upon the retention of other probationary employees as provided in sections two

and five of this article. Any such probationary teacher or other probationary employee who is not rehired by the board at that meeting shall be notified in writing, by certified mail, return receipt requested, to such persons' last known addresses within ten days following said board meeting, of their not having been rehired or not having been recommended for rehiring.

Any probationary teacher who receives notice that he or she has not been recommended for rehiring or other probationary employee who has not been reemployed may within ten days after receiving the written notice request a statement of the reasons for not having been rehired and may request a hearing before the board. The hearing shall be held at the next regularly scheduled board of education meeting or a special meeting of the board called within thirty days of the request for hearing. At the hearing, the reasons for the nonrehiring must be shown.

4. “West Virginia Code § 18A-2-8a gives broad discretion to the county board when determining whether or not to rehire a probationary employee, and to prove his case, Grievant must establish the board’s decision to not renew his contract was arbitrary and capricious.” *Mellow v. Jefferson County Bd. of Educ.*, Docket No. 2010-1397-JefED (Oct. 8, 2010) (citing *Beheler v. Logan County Bd. of Educ.*, Docket No. 98-23-276 (Dec. 11, 1998); See *Miller v. Bd. of Educ.*, 190 W. Va. 153, 437 S.E.2d 591 (1993); *Pockl v. Ohio County Bd. of Educ.*, 185 W. Va. 256, 406 S.E.2d 687 (1991); *Rogers v. Logan County Bd. of Educ.*, Docket Nos. 99-23-196/246 (Nov. 16, 2002)). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604 at 614, 474 S.E.2d 534 at 544 (1996). (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

5. “A board of education may not ‘refuse to rehire a probationary employee for just any, or no, reason.’ *Cordray v. Wood County Bd. of Educ.*, Docket No. 90-54-

267 (Jan. 31, 1991). The reasons identified by Respondent for not rehiring Grievant must support that decision. However, those reasons need not rise to the level of a 'for cause' requirement. *Stewart v. Berkeley County Bd. of Educ.*, Docket No. 99-02-224 (Mar. 31, 2000)." *Jarrell v. Jackson County Bd. of Educ.*, Docket No. 04-18-204 (Oct. 27, 2004).

6. Respondent properly followed the requirements of West Virginia Code § 18A-2-8a in the nonrenewal of Grievant's contract. Grievant failed to prove that Respondent's decision was arbitrary and capricious given Grievant's history of absenteeism and continued absence even after taking all days off allowed under his contract.

Accordingly, the grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See W. Va. Code § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. See *also* W. VA. CODE ST. R. § 156-1-6.20 (2008).

DATE: December 24, 2013

Billie Thacker Catlett
Administrative Law Judge